FILE COPY

JAN 29 1936

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1935**

---

# No. 727

---

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL., ETC.,

*Appellants,*

*vs.*

THE TEXAS COMPANY.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

---

## STATEMENT AS TO JURISDICTION.

---

ALBERT A. CARMICHAEL,
*Attorney General of Alabama:*
FRONTIS H. MOORE,
PEYTON BIBB,
THOMAS J. JUDGE,
RICHARD T. RIVES,
*Counsel for Appellants.*

# INDEX.

## SUBJECT INDEX.


| | Page |
|---|---|
| Statement as to jurisdiction | 1 |
| Statutory provisions relied upon, date of decree sought to be reviewed and date upon which application for appeal was presented | 2 |
| State statute the validity of which is involved | 2 |
| Nature of the case and rulings below | 2 |
| Cases believed to sustain the jurisdiction | 7 |


## TABLE OF CASES CITED.


| | |
|---|---|
| Brucker v. Fisher, 49 F. (2d) 759 | 7 |
| Panhandle Oil Company v. State of Mississippi, ex rel. Knox, Attorney General, 277 U. S. 218 | 4 |
| Stratton v. St. Louis S. W. Ry. Co., 282 U. S. 10, 51 Sup. Ct. Rep. 8, 75 L. Ed. 135 | 7 |
| T. L. Smith et al. v. Wilson et al., 273 U. S. 388 | 7 |
| Wheeler Lumber, Bridge & Supply Company v. United States, 281 U. S. 572 | 5 |


## STATUTES CITED.


| | |
|---|---|
| Act of the Legislature of Alabama approved January 31, 1935 | .. |
| General Acts of Alabama of 1923, page 36, as amended by General Acts of Alabama of 1927, page 326, as further amended by General Acts of Alabama of 1931, page 458 | 2 |
| General Acts of Alabama of 1927, page 16 | 2 |
| General Acts of Alabama of 1931, page 859 | 2 |
| General Acts of Alabama of 1932, page 314 | 2 |
| General Revenue Acts of Alabama approved July 10, 1935, as Section 348, Schedules 156 to 156.20 | 2 |
| Schedule 156 | 2 |
| Schedule 156.1 | 3 |
| Schedule 156.2 | 3 |
| Judicial Code, Sections 238 and 266, as amended by the Act of February 13, 1925, c. 229, section 1 (42 Stat. 938), (28 U. S. C. A., Secs. 345 and 380) | 2, 7 |

IN THE

# DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

## No. 662

THE TEXAS COMPANY, A CORPORATION,
*Plaintiff,*

*vs.*

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ALBERT A. CARMICHAEL, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA, HENRY S. LONG, AS PRESIDENT OF THE STATE TAX COMMISSION OF ALABAMA, AND JOHN P. KOHN, SR., AND W. W. RAMSEY, AS ASSOCIATE MEMBERS OF THE STATE TAX COMMISSION OF ALABAMA,
*Defendants.*

BEFORE THE HONORABLES J. C. HUTCHESON, CIRCUIT JUDGE, AND ROBERT T. ERVIN AND CHARLES B. KENNAMER, DISTRICT JUDGES, COMPOSING THE COURT CONSISTING OF THREE JUDGES UNDER SECTION 380 OF TITLE 28 OF THE UNITED STATES CODE ANNOTATED (JUDICIAL CODE SECTION 266 AMENDED).

## STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Sections 238 and 266

of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1 (42 Stat. 938) (28 U. S. C. A., Secs. 345 and 380). The final decree of the Three-Judge District Court was entered December 7th, 1935. Application for appeal is herewith presented on the 3rd day of January, 1936.

The statutes of the State of Alabama, the validity of which is involved, are the gasoline excise tax acts: General Acts of Alabama of 1923, page 36 as amended by General Acts of Alabama of 1927, page 326, as further amended by General Acts of Alabama of 1931, page 458; also General Acts of Alabama of 1927, page 16; also General Acts of Alabama of 1931, page 859; also General Acts of Alabama of 1932, page 314, also an Act of the Legislature of Alabama approved January 31st, 1935, not yet printed in official bound edition; all of which said gasoline excise tax acts are consolidated in the General Revenue Acts of Alabama approved July 10th, 1935, as Section 348, Schedules 156 to 156.20, inclusive, thereof, also not yet printed in official bound edition but reading in pertinent part as follows:

> "Schedule 156. As used in this Chapter, the term 'Gasoline' shall include gasoline, naphtha, and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines; provided, however, that nothing in this Chapter shall be held to apply to those products known commercially as 'kerosene oil,' 'fuel oil' or 'crude oil' commonly used for lighting, heating or industrial purposes. The word 'person' means and includes persons, corporations, co-partnerships, companies, counties, municipal corporations, school boards, or agencies of the State, or other agencies, associations, incorporated or otherwise singular or plural. The term 'distributor' shall include any person who engages in the selling of gasoline in this State by wholesale domestic trade, but shall not apply to any transaction of such distributor

in interstate commerce. The word 'refiner' shall include any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined. The term 'retail dealer' shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term 'storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same for any purpose.

"Schedule 156.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further, that where the excise tax of six cents ($0.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once.

"Schedule 156.2. The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that 'sellers' of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

The plaintiff, The Texas Company, a corporation, engaged in business in the State of Alabama as a storer,

distributor and retail dealer of gasoline, filed its bill of complaint against the defendants who are the officials of the State of Alabama charged with the administration and enforcement of the said gasoline excise tax acts, and made application for an interlocutory injunction suspending and restraining the enforcement, operation or execution of said gasoline excise tax acts by restraining the actions of the defendants and each of them from the enforcement or execution of said acts insofar as said acts levy or impose excise taxes on plaintiff for selling gasoline or other liquid motor fuels in the State of Alabama to the United States, or for withdrawing from storage in Alabama such commodities for the purpose of selling same to the United States. The Bill further prayed that upon the final hearing a permanent injunction of like effect be issued and granted against the defendants.

The application for an interlocutory injunction, as well as the prayer for a permanent injunction was based upon the ground of the alleged unconstitutionality of the said gasoline excise tax statutes of the State of Alabama. The plaintiff in its bill of complaint referred to the decision of the Supreme Court of the United States in *Panhandle Oil Company* v. *State of Mississippi ex rel. Knox, Attorney General*, 277 U. S. 218, and on that authority claimed that the said excise tax was a tax on the United States contrary to the Constitution of the United States. The admitted facts showed that the plaintiff was engaged in the business of a "storer" of gasoline in the State of Alabama. The defendants by their answer and on the trial insisted that the tax was imposed on the plaintiff as a storer of gasoline, and that the plaintiff's purpose in storing such gasoline and withdrawing the same from storage was immaterial as affecting its liability for the taxes levied by said gasoline excise tax acts, and that said acts were not unconstitutional, and were not controlled by the decision

in *Panhandle Oil Company* v. *State of Mississippi ex rel. Knox, Attorney General, supra,* but that that case clearly had no application for reasons analogous to those stated in *Wheeler Lumber, Bridge & Supply Company* v. *United States,* 281 U. S. 572, that in the present case the tax was not laid on the sale, nor because of the sale, but was laid on the storage measured by the withdrawals from storage, and that the storage was not part of the sale but preliminary to it and wholly the plaintiff vendor's affair.

There were other collateral issues involved in the suit not necessary to be stated as a basis for the jurisdiction of the Supreme Court of the United States.

The application for the interlocutory injunction was presented to the Honorable Charles B. Kennamer, the Judge of the District Court of the United States for the Middle District of Alabama, who called to his assistance to hear and determine the application of plaintiff for an interlocutory injunction in the premises, two other Judges as required by Judicial Code Section 266, as amended by the Act of February 13th, 1925, c. 229, Section 1 (28 U. S. C. A., Sec. 380) viz: the Honorable Joseph C. Hutcheson, Judge of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, and the Honorable Robert T. Ervin, Judge of the District Court of the United States for the Southern District of Alabama.

The cause was submitted on the plaintiff's application for an interlocutory injunction as prayed in its bill of complaint, and other pleadings filed in said cause upon an agreed statement of facts and certain additional evidence introduced by each of the parties. Without the plaintiff in any way waiving its insistence on its application for interlocutory injunction, the cause was also submitted for final decree upon the pleadings and upon the same agreed statement of facts and additional evidence introduced upon

the hearing of plaintiff's application for an interlocutory injunction.

Upon final decree the Three-Judge District Court by a divided opinion, Circuit Judge Hutcheson dissenting and filing his dissenting opinion in writing, held that the said gasoline excise tax acts of Alabama were unconstitutional and void in so far as they imposed an excise tax on account of, or with respect to either sales or withdrawals from storage for sale of gasoline to the United States and decreed as follows:

1. That the motion of the defendants to dismiss the bill of complaint be overruled.

2. That the defendants and each of them be restrained and enjoined from taking any steps or instituting any legal proceedings, civil or criminal, to exercise or enforce the provisions of the statute of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuel where the amount of such tax is measured or determined by the number of gallons of gasoline or other liquid motor fuel sold, distributed or withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on the Texas Company measured or determined by the quantity of gasoline or other liquid motor fuel sold to the United States or withdrawn from storage, and which is sold or delivered to the United States by it or for its account under contracts between it and the United States.

3. That the defendants be taxed with the costs.

The plaintiff pressed its application for an interlocutory injunction, but as final decree was being entered in the cause, the Court found it unnecessary to grant or act

separately on plaintiff's application for an interlocutory injunction.

The appeal prayed for is to the Supreme Court of the United States from the final decree granting a permanent injunction, and is provided for by Judicial Code, Section 266, as amended by the Act of February 13, 1925, c. 229, Section 1 (42 Stat. 938 (28 U. S. C. A., Sec. 380)).

Cases believed to sustain the jurisdiction of the United States Supreme Court are:

*T. L. Smith et al.* v. *Wilson et al.*, 273 U. S. 388.

*Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 135.

*Brucker* v. *Fisher*, 49 F. (2d) 759.

Respectfully submitted,

ALBERT A. CARMICHAEL,
*Attorney General of the State of Alabama;*
FRONTIS H. MOORE,
*Asst. Atty. General of the State of Alabama;*
PEYTON BIBB,
*Spec. Asst. Atty. General of the State of Alabama;*
THOMAS J. JUDGE,
*Farley Bldg., Birmingham, Ala.;*
RICHARD T. RIVES,
*Montgomery, Alabama,*
*Attorneys for Defendants.*

FILE COPY

Office Supreme Court, U. S.
FILED
MAR 18 1936
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1935

—o—

No. 727

—o—

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL, ETC.,
APPELLANTS,

V.

THE TEXAS COMPANY,
APPELLEE.

—o—

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

—o—

## BRIEF FOR APELLANTS.

—o—

ALBERT A. CARMICHAEL,
*Attorney General of Alabama,*
FRONTIS. H. MOORE,
*Assistant Attorney General.*
PEYTON BIBB,
*Special Assist. Attorney General.*
THOMAS J. JUDGE AND
RICHARD T. RIVES,
*Counsel For Appellants.*

# INDEX

## SUBJECT INDEX


| | | Page |
|---|---|---|
| a. | Reference to report of opinions | 1 |
| b. | Reference to statement of jurisdiction | 2 |
| c. | Statement of the case | 2 |
| d. | Specification of errors intended to be urged | 15 |
| e. | Summary of the argument | 18 |
| f. | Argument | 19 |
| | (1) Jurisdiction of the trial Court— As to past transactions As to future transactions | 19 |
| | (2) Meaning and construction of the gasoline excise tax act of Alabama as applied to appellee, The Texas Company | 33 |
| | (3) Constitutionality of said Act as applied to appellee, The Texas Company | 64 |


## STATUTES CITED


| | |
|---|---|
| General Acts of Alabama of 1923, page 36, as amended by General Acts of Alabama 1927, page 326, as further amended by General Acts of Alabama of 1931, page 458, (Acts of the Legislature of Alabama approved Jan. 31, 1935) | 34 |
| General Acts of Alabama of 1927, page 16, | 34 |
| General Acts of Alabama of 1927, page 635 | 24 |
| General Acts of Alabama of 1931, page 859, | 34 |
| General Acts of Alabama of 1931, page 527, | 26 |
| General Acts of Alabama of 1932, page 314, | 34 |
| General Acts of Alabama of 1935, page 508 | 34 |
| (General Revenue Acts of Alabama approved July 10, 1935, as Section 348, Schedules 156 to 156.20) | 36 |

Page

General Acts of Alabama of 1935, page 294, Section 78,..... 28
General Acts of Alabama of 1935, page 307, Section 103,..... 28
General Acts of Alabama of 1935, page 568, Section 379,..... 28
Judicial Code, Sections 238 and 266, as amended by the Act of February 13, 1925, c. 229, section 1 (42 Stat. 938), (28 U.S.C.A., Secs. 345 and 380)..... 2
Judicial Code, Section 267, U. S. C. A. Title 28, Section 384,..... 23

## TABLE OF CASES CITED

Adams, Tax Collector, vs. Southern Railway Co., 176 Ala., page 320, 58 So. 397..... 24
Alabama Gold Life Insurance Co. v. Lott, Tax Collector, 54 Ala. 499..... 23
Allred v. Dunn, Tax Collector, 207 Ala. 469, 93 So. 390..... 24
American Airways v. Wallace 57 Fed. (2d) 877, 47
American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 39 Sup. Ct. Rep. 522..... 53
Boise v. Boise City, 213 U. S. 276..... 22
Bower, Tax Collector, v. American L. & Express Co., 195 Ala. 572, 71 So. 100..... 24
Cavanagh v. Looney, 248 U. S. page 453..... 22
Champlin Mfg. Co. v. Commission, 286 U. S., 210 22
City of Gadsden v. American National Bank, 225 Ala. 490, 144 So. 93..... 24
Coleman v. Eutaw, 157 Ala. 327, 47 So. 703..... 60
Dawson v. Ky. Distilling Co., 255 U. S. 288, 65 L. ed. 638..... 40
3rd Decennial Digest, Courts, Section 366-1..... 54

Page

2nd Decennial Digest, Courts, Section 366-1 ..... 54
Detroit & M. Railway Co. v. Fletcher Paper Co., 248 U. S. 30, 39 Sup. Ct. Rep. affirming Fletcher Paper Co. v. Detroit & M. Railway Co., 198 Mich. 469 ..... 53
Edelman v. Boeing Air Transport, 289 U. S. 249, 53 Sup. Ct. Rep. 591, 77 L. ed. 1155 ..... 50
Educational Films Corp. v. Ward, 282 U. S. 379, 387, 75 L. ed. 400, 404 ..... 65
Ervin & Stevens, Receivers, etc. v. State of Ala. (Ms.) decided November 22, 1935 ..... 45
Foster & Creighton Co. v. Graham, 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 976 ..... 66
Helvering v. Powers, 293 U. S. 214 ..... 33
High on Injunctions, Vol. 1, 4th Ed., Section 491, page 456 ..... 21
High on Injunctions, Vol. 1, 4th Ed., Section 23, page 38 ..... 21
Indian Motorcycle Co. v. U. S. 283 U. S. 570, 75 L. ed. 1277 ..... 67
Jefferson County v. Hard, 227 Ala. 201, 149 So. 81 ..... 31
Kansas City, Memphis & Birmingham Ry. Co. v. Stiles, 37 Sup. Ct. Rep. 48 ..... 54
Mathews v. Rogers, 284 U. S. 521 ..... 32
North Carolina & St. L. Railway v. Wallace, 288 U. S. 249, 53 Sup. Ct. Rep. 345 ..... 45
Northport v. Hartley, 283 U. S. 568 ..... 22
Nutt v. Ellerbe, 56 Fed. (2d) 1059 ..... 28
Oates v. Whitehead, Tax Collector, 173 Ala. 209 55 So. 803 ..... 24
Ohio v. Helvering, 292 U. S. 360 ..... 32
Orange State Oil Co. v. Amos, 100 Fla. 884, 130 So. 707 ..... 41

Page

Pan-American Petroleum Corp. v. State of Ala. 67 Fed. (2d) 590, Certiorari denied, 291 U.S. 670 ..... 63
Panhandle Oil Co. v. State of Miss. ex rel. Knox, 277 U. S. 218, 48 Sup. Ct. Rep. 451, 72 L. ed. 857 ..... 65
Patterson v. Pitts, Tax Collector, 180 Ala. 100, 60 So. 390 ..... 24
Scottish Union & National Insurance Co. v. Bowland, 196 U. S. 611 ..... 22
South Carolina v. United States, 199 U. S. 437 ..... 32
Standard Oil Co. of California v. California, 291 U. S. 242, 59 C. J. 1079, Section 635 ..... 55
State v. City of Montgomery, 228 Ala. 93, 151 So. 856 ..... 63
State v. Tuscaloosa Building & Loan Assn., 161 So. 530, 534 ..... 64
Stewart, Clerk, v. Wilson Printing Co., 210 Ala. 624, 99 So. 92 ..... 63
Stratton v. St. L. & S. F. R. Co., 284 U. S. 530 ..... 32
Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30, 44 Sup. Ct. Rep. 432 ..... 54
Trinity Farm Constr. Co. v. Grosjean, 291 U. S. 466, 78 L. ed. 918 ..... 70
United States v. Butler, 80 L. ed. 287 ..... 33
United States v. Healey, 160 U. S. 136, 60 Sup. Ct. Rep. 16, 40 L. ed. 369 ..... 63
Ward, Tax Collector, v. First National Bank of Hartford, 142 So. 93 ..... 24
Wheeler Lumber B. & S. Co. v. U. S. 281 U. S. 572, 74 L. ed. 1047 ..... 69
Woco Pep Co. of Montgomery v. City of Montgomery (Ala.) 121 So. 64 ..... 69
Yarnell v. Hillsborough, 70 Fed. (2d) 435 ..... 22

# Supreme Court of the United States

OCTOBER TERM, 1935

No. 727

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL, ETC.,
APPELLANTS,

V.

THE TEXAS COMPANY,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

## BRIEF

a. The opinions delivered in the Court below have not yet been published. The majority opinion of District Judge Ervin concurred in by District Judge Kennamer appears on pages 226 *et seq.* of the printed record. The dissenting opinion of Circuit Judge Hutcheson appears on pages 233 *et. seq.* of the printed record.